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IN THE

Supreme Court of the United States

October Term, 1946

No. 1103

EDWARD C. COMMERS, Petitioner,

vs.

THE UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT and BRIEF IN SUPPORT THEREOF

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THUNBER'S [redacted] HELENA

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INDEX TO PETITION

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Comes now Edward C. Commers, the above named Petitioner, and respectfully petitions this Honorable Court for the issuance by it of its Writ of Certiorari, addressed to the said United States Circuit Court of Appeals for the Ninth Circuit, directing said Court to certify the above entitled cause to this Court for review and final decision.

SUMMARY AND STATEMENT OF MATTER INVOLVED

This action is brought by Petitioner, a conscripted veteran of World War II, on his own behalf and on behalf of all others similarly situated, for the purpose of obtaining a declaratory judgment defining the rights of disabled war veterans under the constitution, and declaring that such veterans are entitled, as a matter of constitutional right, and not as gratuity, to just compensation under the Constitution and particularly under the proviso of the Fifth Amendment thereto which prohibits the taking of private property for public use without just compensation, upon the principle that the loss of the bodily integrity and earning power of the citizen in war service is "private property" within the meaning of that proviso; and declaring that they are entitled to due process of law in the establishment of the fact and extent of such disability in courts of law.

The conscription, military service, and total disablement of Petitioner, and the denial of any obligation by Respondent are alleged.

A complete and detailed recital of the allegations of the petition are set out in the Statement of Facts contained in the accompanying brief.

A motion to dismiss the action was sustained by the District Court, and judgment entered accordingly, and on appeal to the Circuit Court of Appeals for the Ninth

Circuit said judgment was affirmed without written opinion.

BASIS OF THE JURISDICTION OF THE SUPREME COURT

Jurisdiction is conferred upon the courts of the United States to entertain petitions for declaratory judgments, and to render such judgments, by the provisions of

Sec. 400, Title 28, U. S. C.

The applicable part of that section reads as follows:

> "In cases of actual controversy (except with reference to Federal taxes) the courts of the United States shall have power, upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party pertaining to such declaration, *whether or not further relief is or could be prayed*, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such." (Italics ours)

To the extent that the consent of Congress is necessary to the maintenance of an action for a declaratory judgment such consent is given by this section, which not only authorizes a petitioner to maintain the proceeding, but invests all the Federal Courts in their respective capacities with jurisdiction to entertain and to enter appropriate judgments upon any such petition.

As we construe the record, the lower courts have not denied the right of petitioner to maintain this proceed-

ing nor their jurisdiction to enter a declaratory judgment.

The language of Section 400, "whether or not further relief is *or could be* prayed," indicates that the first question for the Court to decide is whether there is an obligation to recompense for service-incurred disabilities. The question of the right to sue upon such obligation need be passed upon only if the basic obligation is held to exist.

The language of this Court in

> Perry vs. U. S.,
> 294 U. S. 330,
> 79 L. ed. 912,

illustrates the principle:

> "The fact that the United States may not be sued without its consent is a matter of procedure *which does not affect the legal and binding character of its contracts.* While the Congress is under no duty to provide remedies through the courts, the contractual obligation still exists and, despite the infirmities of procedure, *remains binding upon the conscience of the sovereign.*" (Italics ours)

The first question to be considered is whether the constitutional obligation exists. If the Court should determine that question in favor of the petitioner, then for the first time the question of the immunity of the United States from suit would become material.

The jurisdiction of the Supreme Court to review the decision of the Circuit Court of Appeals rests upon the provisions of

Sec. 347, Title 38, U. S. C.,

which provides:

> "In any case, civil or criminal, in a circuit court of appeals, * * * it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether government or other litigant, to require by certiorari, either before or after judgment or decree by such lower court, that the case be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

QUESTIONS PRESENTED

The questions presented by the petition arise upon the following affirmative propositions:

> First: That under the general compact, which we call the Constitution of the United States, petitioner and others similarly situated are entitled to just compensation for their contribution of property,—bodily integrity and earning power,—to the common defense in excess of their proportionate shares.
>
> Second: That the provision of the Fifth Amendment to the Constitution which prohibits the taking of private property for public use without "just compensation" requires that citizens whose bodily integrity and earning power have been consumed in the common defense be justly compensated therefor as a matter of constitutional right.

Third: That as a corollary to the foregoing propositions petitioner and all others similarly situated are entitled to due process of law, in courts independent of the political branches of government, in the trial of the question of the existence and extent of such disabilities, as in the case of any other common law right.

Fourth: That the Bill of Rights is a limitation upon the power of Congress and the executive, and its benefits run directly from the sovereign people to the citizen, and that those provisions are enforceable by the courts of the United States without the consent of Congress, even though suit against the United States may be necessary; consent to such suit being implied in the Fifth Amendment.

REASONS FOR THE ALLOWANCE OF THE WRIT

The reasons why it is imperative that the writ issue in this case and that this Court review the same and adjudge the rights of petitioner are the following:

1. That the said Circuit Court of Appeals has, without written opinion, summarily decided a vitally important question involving the construction of the Constitution of the United States, which question has not been, but should be, settled by this Court.

2. That said Circuit Court of Appeals has decided a Federal question in a way in conflict with applicable decisions of this Court, specifically,

U. S. vs. Lee,
16 Otto, 196,
27 L. ed. 171

Gt. Falls Mfg. Co. vs. U. S.,
112 U. S. 645,
28 L. ed. 846

3. That the questions presented by the petition are of vital importance to many hundreds of thousands of our war disabled, and that those questions should be finally settled by a decision of this Court.

4. That it is for this Court to analyze and differentiate its own previous decisions not involving the questions presented here, but in which this Court has made statements which embarrass the lower courts of the United States and prevent a free determination of said issues by such courts, as they are loath to override a specific statement of this Court, even though made in a case not involving any question at issue here.

5. That petitioner and the others similarly situated are entitled to have this primary question determined without embarrassment by decisions of infinitely less importance in which language has been used by this Court in excess of the necessities of the case then before it, or in which rights not comparable to those of the disabled veteran are involved.

6. That petitioner and the others similarly situated are entitled to have the Constitution and its amendments construed as a matter of first impresison, unhampered by previous decisions.

7. That petitioner and those of the three million or more other disabled war veterans of the United States

who are suffering hardship and humiliation from the denial by Congress of any obligation, and the denial of the due process accorded even to the dive keeper and the enemy alien, have the right to have this Honorable Court, the court of last resort, state in plain language if and why they are the only class of persons, not only in this country but in the whole world, who have no constitutional rights, particularly the right to just processes in the determination of their right to live upon compensation for their disabilities, and not as underprivileged mendicants.

Wherefore, petitioner prays that this Honorable Court issue its Writ of Certiorari, directed to the said United States Circuit Court of Appeals for the Ninth Circuit, directing said Court to certify the said cause up to this Honorable Court, and that this Court upon the filing of the record herein and after appropriate proceedings herein, enter its declaratory judgment as prayed for in the petition herein.

Dated February 24th, 1947

JOHN W. MAHAN
C. E. PEW
Attorneys for Petitioner

I, C. E. Pew, attorney for the above named petitioner, do hereby certify that the foregoing petition is well founded and is not interposed for delay.

Dated February 24th, 1947

C. E. PEW,

Attorney for Edward C. Commers, Petitioner

IN THE

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October Term, 1946

No._____

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vs.

THE UNITED STATES OF AMERICA, Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

SUBJECT INDEX TO BRIEF

STATUTES

DECISIONS

The statutes which sustain the jurisdiction of this Court are

Sec. 400, Title 28, U. S. C.
Sec. 347, Title 38, U. S. C.

The judgment of the District Court was entered on July 30, 1946. It appears in the record in this case (R. 35); but we do not find it in the Federal Reporter.

The decision of the United States Circuit Court of Appeals for the Ninth Circuit was entered orally on January 16, 1947, but no written opinion was handed down. The decision is not yet reported in the Federal Reporter. It is found in the record.

R. p. 45 et seq.

JURISDICTION

This action arises entirely upon the Constitution of the United States and involves an interpretation of that instrument which has never before been presented to this Court, and which requires the considered judgment of this Court.

Primary jurisdiction is based upon the provisions of

Sec. 400, Title 28, U. S. C.

the statute conferring jurisdiction upon the federal courts to enter declaratory judgments.

The appellate jurisdiction of this Court arises from the provisions of

Sec. 347, Title 38, U. S. C.,

which gives this Court appellate jurisdiction, by the process of certiorari, to review any decision of a Circuit Court of Appeals.

STATEMENT OF FACTS

Petitioner filed his petition in the District Court of the United States for the District of Montana, alleging:

The citizenship of petitioner, the inception of World War II, the enactment of the Selective Service Acts by Congress, the drafting of about 15 million of our young men for military service (Pars. II-III, R. 2, 3); the drafting of petitioner on October 19, 1942, his military service until discharge on August 6, 1945 (Par. IV, R. 4); details of his service (Pars. V-XII, R. 6, 7); injuries and sickness incurred in line of duty (Pars. X-XIII, R. 6, 7).

The total disability of petitioner is alleged (Pars. XIV-XV, R. 2, 8); refusal of respondent to recognize any obligation or to pay except charitable payments (Par. XVI, R. 8); ability of respondent to pay (Par. XVII, R. 9); that the body of petitioner was taken for a public use and so used by respondent and has been damaged in such service (Par. XVIII, R. 9).

Adoption of the Declaration of Independence, of the Constitution and the 5th, 7th and 13th Amendments is alleged (Pars. XIX-XXII, R. 9, 11); that petitioner's body is his own and not the property of any other group

of citizens; that the citizens who fight do not become the slaves, serfs or chattels of those who do not fight, to be sacrificed in war without obligation; that they are entitled to just compensation and to due process of law guaranteed by the Constitution (Par. XXIII, R. 11, 12). Just compensation is defined (R. 12).

It is alleged that all laws of Congress now in force are based upon the theory that those who fight are the slaves, serfs or chattels of those who do not fight, to be sacrificed in the common defense without legal obligation and that payments made to them is gratuity or common charity; that charity does not pay debts (Par. XXV, R. 12, 13).

That the earning power of man belongs to him and is property (Par. XXVI, R. 13); that the expenditure of bodily integrity of man and of his earning power in battle or in any other type of military service in time of war is the taking of private property for a public use, for which respondent is required by the 5th Amendment to make just compensation, the same as for earning power in the form of ships, etc. (Par. XXVII, R. 13).

The unconstitutionality of the Economy Act of March 20, 1933, public No. 2, 73rd Congress, 48 Stat. 11, is alleged (Par. XXVIII, R. 13, 14); that the constitutional provisions referred to in the petition are enforceable by the courts without sanction of Congress, and that no consent to sue other than that implied in the 5th Amendment is necessary (Pars. XXIX-XXX, R. 14);

that unless the relief prayed for is granted petitioner will be denied his constitutional rights (Par. XXXI, R. 15).

Prays for judgment construing the Constitution and adjudging, 1. That the taking of petitioner's body was the taking of private property for public use; 2. That the United States is obligated to make just compensation for war disabilities; 3. That such war disabled have a constitutional right to due process and other remedies; 4. That the United States has consented to be sued upon these claims; and 5. For further relief. (R. 15, 16).

Respondent moved to dismiss upon the grounds, first, that the petition did not state facts to warrant recovery, and second, that the respondent had not consented to be sued (R. 17), which motion the District Court sustained, filed its opinion (R. 18-34), and entered judgment dismissing the cause (R. 35).

Petitioner then appealed from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, which Court on January 16, 1947, affirmed the judgment of the District Court (R. 45 et. seq.)

Order staying mandate to the District Court entered January 30, 1947.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

1. In affirming the judgment of the District Court;

2. In not reversing said judgment with instructions to said District Court to overrule said motion to dismiss, as to each ground stated therein, and in its entirety.

FOREWORD

The petition in this case, for the first time in history, presents the question of the status, under the Constitution, of a citizen conscripted into the military service of the United States in time of war and disabled in such service.

This question comes after a world war in which for the first time our armies were raised by conscription. Every able-bodied youth who enlisted in any of the services was subject to the draft, and would have been drafted had he not enlisted, and the *obligation* of this country to such men who were disabled in service is not lessened by the fact that they responded to the call insead of waiting to be sent for.

The instant case, however, involves the case of a man who was conscripted.

World War II marks the definite change from the days when our wars were fought primarily by volunteers, presumably from "patriotic" motives, to a time when we have entered an era where war seems to be a part of our daily business, and the system of taking men without regard to patriotic urge, the same as we might

take insensate property, becomes an established institution.

The principles here invoked are founded upon a different premise than any case in which the rights of disabled veterans has ever been considered, and this fact calls for a new and untrammeled consideration of the Constitution.

We do not question the power or the duty of Congress to raise armies by conscription; but we do question the right of Congress or of our people to conscript our boys to fight a war without thereby assuming responsibility to them for the damage done to their bodies and their earning power in our defense—a portion of their lives expended in a public use—*the same as we would become responsible to the owner of a B-29 for damage done to it in battle.*

ARGUMENT

The motion to dismiss necessarily admits for the purposes of this argument all facts alleged in the petition. Ordinarily this state of the pleadings would leave nothing to be decided but the legal questions arising from such admitted facts.

The District Court, however, went back of this admission and discussed the question as to the status of the human body and its earning power as a matter of law. The Court of Appeals filed no written opinion, so we are not informed as to the views of that Court.

We will therefore discuss this phase as though we were inquiring into evidence upon which a finding had been made.

The questions involved arise in the following order upon the following propositions:

1. The body and earning power of the citizen are private property and belong to the individual citizen. (This point is first discussed because of its bearing upon the entire case).

2. Under common law principles and under the compact which we call the Constitution of the United States, the citizen disabled in war service is entitled, as a matter of right, and not as charity, to compensation for his loss of bodily integrity and impairment or loss of earning power.

3. Loss of bodily integrity and impairment or loss of earning power suffered by a conscripted citizen in war service is private property taken for public use under the last clause of the Fifth Amendment and for which such citizen is entitled to just compensation.

4. As a corollary to the foregoing proposition the war disabled are entitled to due process of law guaranteed by the Bill of Rights.

5. The war disabled have the right to sue the United States in the courts of the United States for such just compensation without the consent of Congress and in spite of its denial of that right.

Before proceeding with our discussion of the affirmative propositions it will be well to state the contrary theory.

THEORY OF CONGRESSIONAL LEGISLATION

The theory of Congress, as deducible from its Acts, is,

1. That this country owes no legal obligation to its disabled war veterans, but that everything it does for them is a gratuity, a polite name for charity; and

2. That as a corollary to this primary proposition the war disabled are not entitled to due process of law in the determination of the existence and extent of their service-connected disabilities.

In other words, Congress acknowledges no legal obligation of this country to do anything for our war disabled.

That this is a correct definition of the theory of Congress is established beyond cavil by the provisions of

The Economy Act of Mar. 20, 1933
Secs. 701 et seq., Title 38 U. S. C.

That Act, while ostensibly placing the control of "pensions" in the hands of the President, *actually* places it in the hands of the Veterans Administrator by providing that

"All decisions rendered by the Administrator of the Veterans Affairs (now Veterans Administrator) under the provisions of this title, or the regulations issued pursuant thereto, *shall be final and conclusive on all questions of law and fact, and no other official (not even the President) or court of the United States shall have jurisdiction to review, by mandamus or otherwise, any such decision.*" (Italics and parenthetical reference ours).

Sec. 705, Title 38, U. S. C.

The Administrator is authorized to "*delegate authority to render decisions to such person or persons as he may find necessary.*"

Sec. 708, Title 38, U. S. C.

The Act repealed all acts granting benefits to disabled veterans from the Spanish-American War down, "*and all laws granting or pertaining to yearly renewable term insurance are hereby repealed.*"

Sec. 717, Title 38, U. S. C.

These are the salient features of the Economy Act which still controls the administration of the affairs of the war disabled, and illustrate the theory of Congress that the disabled war veteran has *no* rights that Congress is bound to respect, *not even contractual rights arising under the insurance policies issued under the War Risk Act*, contracts under which thousands of totally disabled men were then drawing payments—i. e., contracts which had been fully executed by the soldier.

While this Court held, in

Lynch vs. U. S.,
292 U. S. 571,

that these contracts could not be rescinded, yet Congress tried it.

The Act of March 20, 1933, while styled "An Act to Maintain the Credit of the United States Government," has always been called the "Economy Act," although the only economy it effected was the despoliation

of the disabled war veteran. No public bond and no other contract obligation of the United States was disturbed.

By this Act Congress fixed upon our war disabled an autocracy as arbitrary and as absolute as that of any monarchistic or fascist state of the Old World, barring only the power to imprison, to banish, or to execute; an autocracy the like of which no other group of citizens, or even aliens, is subjected to.

Taking up now the affirmative propositions:

I.
THE BODY AND EARNING POWER OF THE CITIZEN ARE PRIVATE PROPERTY AND BELONG TO HIM

This statement is but a truism. Moreover, the principles involved are established beyond question by the decision of this Court in

Scott vs. Sandford,
19 Howard 393
15 L. ed. 691

In that case Chief Justice Taney said:

> "Now, as we have already said in an earlier part of this opinion, upon a different point, *the right of property in a slave is distinctly and expressly affirmed in our Constitution. The right to traffic in it, like an ordinary article of merchandise and property, is also guaranteed to the citizens of the United States* * * *." (Italics ours).

Under that ruling Sandford held the legal title to Dred Scott, a human being, and his earning power, to be dealt with as other merchandise.

When the Thirteenth Amendment was adopted this title reverted to Dred Scott, from whom it had originally been taken. He then had the right to sell his own services (earning power) and collect the price therefor.

A principle which differentiates the democracy from the fascist or nazi state, and from a monarchy, is that in a democracy the body and earning power of the citizen does *not* belong to the state. Under the Thirteenth Amendment the United States cannot legally hold slaves.

When the shackles of monarchy were stricken from the limbs of the colonists by the successful termination of the Americn Revolution of 1776, the colonists and their posterity became free men, the owners of their bodies and of their earning power, subject only to their obligations to yield *proportionately* for the maintenance of government.

The Dred Scott decision establishes beyond cavil the proposition that the human body and its earning power are property, and that they are the private property of the individual citizen.

Destruction or impairment of bodily integrity and earning power forms the basis of recovery in every suit for damages for personal injury.

It is the earning power of man that processes all the commodities consumed or used by human beings.

We have recently seen the entire economy of this nation threatened by the temporary loss of the use of the earning power of a handful of miners.

Anything owned by a human being that can be evaluated in terms of money, or which is useful to the human being, *or the loss of which causes him material damage*, is essentially property.

Clearly, bodily integrity and earning power must be considered as the private property of the citizen for every purpose of this case.

II.

UNDER COMMON LAW PRINCIPLES AND UNDER THE COMPACT WHICH WE CALL THE CONSTITUTION OF THE UNITED STATES THE CITIZEN DISABLED IN WAR SERVICE IS ENTITLED TO COMPENSATION FOR HIS LOSS OF BODILY INTEGRITY AND IMPAIRMENT OR LOSS OF EARNING POWER

A democracy operating under a republican form of government—the only form of government applicable to a democracy—is merely a partnership in which the partners have agreed to surrender proportionately of their income and property for the purpose of maintaining government, and to refrain from infringing upon the rights of other members of that society.

However, an implied provision of that compact is that one who contributes *more* than his proportionate share to the common good, whether bodily integrity and earning power in military service in time of war, or in insensate property for the support of our armies under the same emergency, is entitled to compensation *as a matter of right.*

This country, its products, the tangible property of its people, and their lives and liberties, constitute the partnership assets, and constitute a fund within the meaning of the decision of this Court in

Trustees vs. Greenough,
105 U. S. 527
26 L. ed. 1157

There this Court said, and in doing so but stated a natural principle of equity, that one who contributes more than his proportionate share for the protection of a fund in which many are interested is entitled to reimbursement from such fund.

It is this principle which lies behind the last proviso of the Fifth Amendment, the prohibition against the taking of private property for a public use without just compensation.

Had such principle not been recognized by James Madison and the others who took part in the enactment of the Bill of Rights that provision would never have been adopted. It was but to insure its observance by Congress that this principle, with which the original Con-

stitution was pregnant, was expressly protected by a positive mandate.

If, under this compact, a part of the citizens may send the other part into the foxholes to fight their battles, and remit them to the status of mendicants, or wards of the government, when they return disabled, what is the difference between the status of such a disabled soldier and a slave? Each is a ward of his master and has no legal or Constitutional rights as to his disabilities.

Such a construction makes the people who do not fight the masters of those who fight, not only while they fight, but if disabled, then for the rest of their lives, and reduces the disabled soldier to the role of a vassal, or chattel.

III.

LOSS OF BODILY INTEGRITY AND IMPAIRMENT OR LOSS OF EARNING POWER SUFFERED BY A CONSCRIPTED CITIZEN IN WAR SERVICE IS PRIVATE PROPERTY TAKEN FOR PUBLIC USE UNDER THE LAST CLAUSE OF THE FIFTH AMENDMENT TO THE FEDERAL CONSTITUTION FOR WHICH SUCH CITIZEN IS ENTITLED TO JUST COMPENSATION

The Fifth Amendment provides in its last clause,

> "nor shall private property be taken for public use without just compensation."

The Constitution, and particularly its first ten amendments, is designed exclusively for the preservation of the rights of the individual citizen—a human being.

It was not designed to protect private property as such. The prohibition is intended to protect the individual citizen from despoliation; to prevent the taking of his private property without just compensation, of whatever that property may consist; whether primary property, bodily integrity and earning power, or secondary property, land, ships, guns; in short, anything of value or useful to him, *the deprivation of which will cause him material damage.*

"Property," within the purview of this amendment, need not be of such a character that it may be wrapped up like ordinary merchandise.

In World War II we raised our armies by conscription. With but relatively few exceptions those who enlisted were subject to the draft.

We thus have a taking within the meaning of the Fifth Amendment; and if bodily integrity and earning power of the soldier is impaired or destroyed in such use we become obligated to him under the last proviso of the Fifth Amendment to make "just compensation," just as we would be obligated to the owner of a B-29, of a ship, or of any other paraphernalia, if we took it for war service and it was damaged or destroyed in such service.

Section 8 of Article I of the Constitution empowers Congress to "raise and support" armies.

If the war emergency gave Congress the right to conscript our youth for our armies, without any resulting obligation to compensate for bodily integrity and earning power damaged or destroyed in such service, then by the same token that emergency *required* the taking of insensate property without compensation for such property as was damaged or destroyed, instead of paying not only cost or value, but billions of dollars of profit.

The original Constitution gave Congress the power to take private property for public use, and the power to pay for it.

The last proviso of the Fifth Amendment is a mandate that Congress discharge the obligation to pay, and was intended to guarantee the equal treatment of the citizens whose property was taken, instead of leaving it to the political whim of Congress to pay or not,—to pay its favorites and to deny payment to those not in its favor.

It may be said that "patriotism" requires the soldier to make unrequited sacrifice of his most valuable property in the service of his "sovereign," a sovereign to whom Congress, by necessary implication, says the citizen who furnishes insensate material owes no such duty.

In the first place, the obligation of patriotism rests upon every citizen, and if the soldier must sacrifice his body gratuitously, so must the producer gratuitously sacrifice his insensate property.

If this mythical "sovereign" may demand this patriotic duty from the soldier, then if it is a just sovereign it must demand the same duty from the civilian.

There is no such sovereignty, however. The only "sovereign" to whom the soldier or civilian owes any duty is the democratic sovereignty of which he is a part —a society which owes him the reciprocal obligation to recompense for contribution to its defense in excess of his proportionate share.

> "Under our system the *people*, who are there (in England) called *subjects*, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no such person, however near to those in power or however powerful himself, to whom he need yield the rights which the law secures to him *when it it well administered.*"
>
> U. S. vs. Lee,
> 16 Otto 196
> 27 L. ed. 171

The applicability of the Fifth Amendment of course turns on the phrase "private property."

While counsel for Respondent have never discussed the merits of this case, it will doubtless be argued that this term does not include earning power.

While Webster, in common with those not falling within the class which we call the "rank and file," was not thinking about this class of property, there is in his definition a phrase which fits the situation admirably:

"Any valuable right or interest considered primarily as a source or element of wealth."

Human skill, effort, initiative, inventive genius,—earning power—are the source and the essential ingredients of all wealth. Without this earning power of man we would have no wealth. Without it the trees would not become fashioned into houses and other elements of human comfort and necessity. The metal would not come out of the ground and fashion itself into articles adapted to human use. Coal would not come from the pits to warm us.

Furthermore, without human beings there would be no material property in the finite sense in which that term is used, for all property has value only as it conserves the personal use of human beings.

As we have already pointed out, the Constitution operates on the citizen, and the last proviso of the Fifth Amendment is designed to protect the citizen from despoliation by the political government, a governmental element of which the men who framed the Constitution and the first ten amendments were so distrustful, and which they hedged with so many safeguards.

Every clause of the Constitution must be construed with that thought in mind.

The word "property" is comprehensive, and includes, as we have said, anything of value or useful to the citizen, the loss of which would cause him material damage.

To say that the term "private property" does not include bodily integrity and earning power is to do violence to the simple language of this amendment, and to every principle of constitutional construction, by importing into the word "property" something not there; to deny an essential right by a strained construction, instead of resolving every doubt in favor of the human being.

To so construe that phrase is to place insensate property above human flesh and blood.

IV.

AS A COROLLARY TO THE FOREGOING PROPOSITIONS THE WAR DISABLED ARE ENTITLED TO THE DUE PROCESS OF LAW GUARANTEED BY THE BILL OF RIGHTS

The right to try vital issues in independent courts, especially when such issues involve the person of the citizen and his right to live, is of the very essense of free government.

Without this "due process" we are not a democracy, but a political oligarchy.

One of the complaints in the Declaration of Independence was that such Courts as the King had established were under his direct control.

Due process is now provided for the trial of practically every controversy except that which arises in the

determination of the fact and extent of disability of a disabled war veteran.

Under the

> Reorganization Act of Aug. 2, 1946,
> Public Law 601, 79th Congress,
> Chapter 753, 2nd Session,

a dive-keeper in an out-of-bounds section of a town near which troops are quartered may sue the United States in the federal district court of his district for damage to person, property and *business*, caused by the unnecessary roughness of military police in raiding the place in search of GIs. Moneyed interests have been permitted to sue the United States for nearly a century, and have been provided with courts for that purpose.

Even Yamashita, the Tiger of Malaya, found ready access to this Court and was heard on the merits; but the soldier who chased the Tiger to his lair is cast into outer darkness; banished from the Courts he suffered to save.

If that be justice, all we can say is, "Oh! Fascism! Where is thy sting?"

The Veterans Administrator, a political employee of the political branches of the government, and his political employees, exercising judicial powers greater even than this Court (for this Court cannot review their decisions under the Economy Act), constitute the only "court" to which the disabled veteran may resort when his right to live decently is at stake.

No matter how unwarranted, how arbitrary, how unjust, how contrary to law, may be the decisions of this mock court of the autocrat, the Veterans Administration, *even this Court, by the terms of the Economy Act, is prohibited from entertaining any proceeding for the review of such decisions.*

The Veterans Administrator has the power to close every veterans hospital and deny every pension, and this Court is helpless to interfere.

Sec. 705, Title 38, U. S. C.

This system can be justified only upon one of two theories:

First: That the disabled veteran is not entitled to justice, or

Second: That these unskilled and non-judicial political underlings of the political branches of government are as capable of administering justice as the judges of our federal courts.

If the latter hypothesis is accepted then no reason remains for maintaining our expensive federal judicial system, unless it is maintained for special privilege.

If the system established under the Economy Act is held to be constitutional, then the future generations of American youth will find themselves lashed to the chariot wheel of wealth, compelled to fight its wars, and if disabled in such service, remitted to the status of mendicants if they look to their country for the means of

living decently, and denied the just processes of law freely accorded to the dive-keeper, the profiteer, and the enemy alien.

V.

THE WAR DISABLED HAVE THE RIGHT TO SUE THE UNITED STATES IN THE COURTS OF THE UNITED STATES FOR SUCH JUST COMPENSATION WITHOUT THE CONSENT OF CONGRESS AND IN SPITE OF ITS DENIAL OF THAT RIGHT

In considering the so-called immunity from suit we must keep in mind the difference between the United States, *the government created by the people*, and operating only under delegated powers, and the United States, *the sovereign people*, from whom those delegated powers emanate, and to whom is reserved all powers not delegated.

Const., 10th Amendment.

From this premise the following conclusions naturally flow:

First: That only in cases of rights created by an Act of Congress, the agency acting under delegated powers, may the right to sue in court be withheld, and the citizen remitted to such administrative processes as Congress may provide.

Second: That any right guaranteed directly to the citizen by the sovereign people necessarily carries the

implied right to sue the United States if necessary to do so to obtain its benefit, and that Congress is without power, by action or by non-action, to abridge that right.

The bare statement of these propositions demonstrates their correctness. The Constitution very clearly defines the powers and prerogatives of Congress, and reserves all others to the people.

The Bill of Rights runs directly from the sovereign people to the citizen, and in no respect is the enjoyment of any of its provisions made dependent upon the will of Congress.

All limitations contained in the Bill of Rights are directed at Congress and the executive, and are intended to prevent the encroachment of the political branches of government upon the rights guaranteed by the Constitution to the citizen.

It seems absurd to say that a citizen cannot sue the United States, if suit be necessary to enforce a constitutional provision adopted for his protection, without the consent of the legislative and the executive, *the very agents such provision was designed to restrain.*

The people are the sovereign, and when the people through a constitutional enactment extend certain rights and immunities to the individual citizen, there is implied consent that these rights and immunities may be enforced in any appropriate manner, by suit, if necessary; otherwise those provisions are but futile gestures,—mere

suggestions to Congress, to be followed or disregarded by it at will.

Our government consists of three branches, operating under powers and under limitations prescribed by the Constitution—the legislative, the executive and the judicial departments, each independent of the other.

The independent judiciary marks the difference between a democracy and a totalitarian state. The judiciary is the guardian of the rights guaranteed by the Bill of Rights to the individual citizen, and is the real bulwark of liberty.

Should the judiciary abdicate its prerogatives and disregard its sacred trust, permit the executive and the legislative to hide behind the alleged immunity from suit for the purpose of evading a constitutional obligation, we may as well burn the Bill of Rights as a meaningless gesture.

James Madison said, in offering the first ten amendments to the First Congress:

> "If they are incorporated into the constitution, *independent courts of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the declaration of rights.*"
>
> Journal 1st Congress, Vol. 1, p. 457

To say that these "independent courts" must ask Congress and the executive branch for permission to entertain a suit to resist "assumption of power in the legislative or executive," or "encroachment upon rights expressly stipulated for in the Declaration of Rights," such as the taking of private property without just compensation under the 5th Amendment, would be to say that these "independent courts of justice" are merely lackeys of the political branches of government. The adoption of these amendments, with such a construction, would be as futile as locking up a burglar and then giving him the key to the jail.

If such be the law, Congress, by repealing every law granting permission to sue the United States, including the Court of Claims Act, could take private property for public use at will and without compensation, and snap its fingers at the Constitution and the courts; a conclusion which shocks the intelligence of every understanding American.

To adopt some of the language of Justice Miller, upon the same point, in the case of

U. S. vs. Lee,
16 Otto 196,
27 L. ed. 171:

"If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has just claim to well regulated liberty and the protection of personal rights." (Italics ours).

The last proviso of the Fifth Amendment is the only provision of the constitution and its amendments which in the final analysis requires suit against the United States.

Under the constitution, by virtue of specific provisions, or as necessarily incident to powers specifically granted, Congress has the power to take all private property necessary for the national defense *and has the power to pay for it.*

Prior to 1789, however, there was no specific provision *requiring* Congress to pay for private property taken for public use.

The sole purpose of the last clause in the Fifth Amendment was to *compel* payment for such property so taken.

It was also the purpose, in enacting the Bill of Rights, *to insure the equal distribution of its protection to all citizens similarly situated,* instead of leaving the rights guaranteed by the first ten amendments to be parcelled out by Congress as political largess, which has been the practice, in all ages, of political governments not restrained by a constitution and an independent judiciary.

We will confine our discussion mainly to two decisions of this Court which establish the principle involved in the second proposition, that no action or nonaction by Congress can deprive the courts of jurisdiction to try any case arising directly under the constitution or any of its amendments.

The first case is that of

U. S. vs. Lee
16 Otto 196
27 L. ed. 171

Briefly stated, the facts in that case were these:

Lee sued Kaufman and Strong and others, in the Virginia Court, to recover land known as the Arlington Estate, upon which the United States had established a fort and a cemetery. Kaufman and Strong were the agents of the government and occupied the land for the government. The action was in ejectment.

The case was later removed into the Circuit Court of the United States. After such removal the United States Attorney General filed in the proceeding a paper in which he stated that the land in controversy was

> "*occupied and possessed by the United States through its officers and agents, charged in behalf of the government of the United States with the control of the property, and who are in the actual possession thereof, as public property of the United States, for public uses, in the exercise of their sovereign and constitutional powers, as a military station*, and as a national cemetery established for the burial of deceased soldiers and sailors." (Italics ours)

and moved the dismissal of the action for lack of jurisdiction.

The interest of the United States was thus squarely presented. The government must necessarily act through its officers and agents, and even if the United

States had been named a defendant and a judgment had been entered against it by name, such judgment would have been enforced by the ejectment of these same agents.

The Circuit Court rendered judgment against Kaufman and Strong, thus ejecting the United States as effectually as though it had been a party defendant *ea nomine.*

The United States appealed to this Court, thereby making itself a party defendant as effectually as though it had originally been named a defendant.

Carson Inv. Co. vs. A. C. M. Co.,
26 Fed. (N.S.) 651

Certiorari denied
278 U. S. 635
73 L. ed. 551

Louisiana vs. McAdoo,
234 U. S. 627

Considering the question, "Could any action be maintained against the defendants for the possession of the land in controversy, *under the circumstances of the relation of that possession to the United States?*" Mr. Justice Miller went fully into the question of sovereign immunity from suit.

After discussing the petition of right in England and th the immunity of the King from suit before the petition of right was granted, he says:

> "What were the reasons which forbade that the King should be sued in his own court, and how do these reasons apply to the political body corporate which we call the United States of America? As regards the King, one reason given by the old judges was the absurdity of the King's sending a writ to himself to command the King to appear in the King's Court. No such reason exists in our government, as process runs in the name of the President and may be served on the Attorney-General. * * * * *Nor can it be said that the dignity of the Government is degraded by appearing as a defendant in the courts of its own creation, because it is constantly appearing as a party in such courts and submitting its rights, as against the citizens, to their judgment.*"

When the matter of delicacy is disposed of, as is done by the quoted language, the only visible purpose of immunity is the attempted evasion by Congress, a creature of the Constitution, of obligations deliberately guaranteed by the Constitution.

Mr. Justice Miller further says:

> "As we have no person in this government who exercises supreme executive power or performs the public duties of a sovereign, *it is difficult to see on what solid foundation of principle the exemption from liability to suit rests. * * * * The principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine.*"

"A pint's a pound," etc.

The Court, on page 177 of the Lawyer's Edition, discusses the situation in England and then says:

"Under our system the *people*, who are there called *subjects*, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no such person, however near to those in power or however powerful himself, to whom he need yield the rights which the law secures to him *when it is well administered.* When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, *not even the United States*, should prevent him from using the means which the law gives him, for the protection and enforcement of that right."

Again:

"Conceding that the property in controversy in this case is devoted to a proper public use, and that this has been done by those having authority to establish a cemetery and a fort, the verdict of the jury finds that it is and was the private property of the plaintiff, and was taken without any process of law and *without any compensation. Undoubtedly, those provisions of the Constitution are of that character which it is intended the courts shall enforce, when cases involving their operation and effect are brought before them.* (See Madison's remarks, supra). The instances in which the life and liberty of the citizen have been protected by the judicial writ of habeas corpus are too familiar to need citation, and many of these cases, indeed almost all of them, *are those in which life or liberty was invaded by persons assuming to act under the authority of the Government.*

"If this constitutional provision is a sufficient authority for the court to interfere to rescue a prisoner from the hands of those holding him under the asserted authority of the Government, *what reason is there that the same courts shall not give*

remedy to the citizen whose property has been seized without due process of law and devoted to public use without just compensation?

"Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer *that this branch of the defense cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the Government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by officers of the Government,* professing to act in its name. There remains to him but the *alternative of resistance,* which may amount to crime. * * * *

"The defense stands here solely upon the absolute immunity from judicial inquiry of everyone who *asserts* authority from the executive branch of the Government, however clear it may be that the executive possessed no such power. *Not only that no such power is given, but that it is absolutely prohibited, both to the executive and the legislative, to deprive anyone of life, liberty or property* without due process of law, *or to take private property without just compensation.*

"These provisions for the security of the rights of the citizen stand in the Constitution *in the same connection and upon the same ground, as they regard his liberty and his property. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the Government established by that Constitution.*

* * * * *

"Shall it be said in the face of all this, *and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President, to be unconstitutional,* that the courts

cannot give remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the Government without any lawful authority, without any process of law and *without any compensation*, because the President has ordered it and his officers are in possesison?

"If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has just claim to well regulated liberty and the protection of personal rights."

We have quoted at length from the decision in the Lee case because it is conclusive upon the proposition that an action may be maintained against the United States if necessary to enforce a right flowing directly from the Constitution.

When this Court, upon the appeal of the United States, with an interest in the subject matter asserted in the case by the United States itself, entered judgment against the agents of the United States, it established the law of exemption as applied to suits to enforce a right flowing directly from the Constitution, and established the principle that the Fifth Amendment necessarily carries the right to sue.

At the time the Lee case was decided, *Congress had not consented to suit upon an obligation arising under the Constitution*, and the decision in that case is conclusive upon the proposition that the consent of Congress was not necessary.

The next case for consideration is that of

Great Falls Mfg. Co. vs. U. S.
112 U. S. 645
28 L. ed. 846

That case was decided three years before the passage of the Tucker Act which for the first time gave the Court of Claims jurisdiction of "claims arising under the constitution."

The main question was whether the property for the taking of which damages was sought had been taken by the government, or whether there had been a tortious taking by an agent of the government.

Having found that the property was taken by virtue of an act of Congress, the Court said:

> "In that view, we are of the opinion that the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for a public use, is under an obligation, *imposed by the constitution*, to make compensation."

Judgment in favor of the Great Falls Manufacturing Company was affirmed.

That decision decides squarely the question presented in the instant case.

The Court of Claims Act at that time did not empower the Court of Claims to entertain a suit "arising under the constitution"; so that the decision was that

a suit upon a right arising under the constitution could be maintained without Congressional action.

These two cases affirm the proposition that the United States may be sued upon a right arising directly from the constitution or any of its amendments, regardless of action or non-action by Congress.

CASES DISTINGUISHED

The only cases involving the right to sue the United States upon the last clause of the Fifth Amendment which have been decided by this Court, or which represent the present law upon the subject, are the cases we have just discussed:

U. S. vs. Lee,
16 Otto 196

Gt. Falls Mfg. Co. vs. U. S.
112 U. S. 645

The Lee case established the law as of its date, differentiated all previous decisions, and is still the law.

All decisions rendered by this Court since the Lee case, and in which this Court has made statements apparently conflicting with the Lee decision, are easily distinguished.

These later decisions involve only rights *finding root in Acts of Congress,* and were not hinged upon the question of the right to sue upon the prohibition contained in the last clause of the Fifth Amendment.

That clause is the only one in the Constitution or its amendments which requires suit against the United States in the final analysis; and a sufficient reason why questions have not come up more frequently is that for nearly a hundred years moneyed interests have been given the right to sue in the Court of Claims, and for sixty years that Court has had jurisdiction of claims arising under the Constitution.

Tucker Act, Mar. 3, 1887,
24 Stat. L. 505

Congress has always provided by law for the acquisition of such insensate property as may be needed for governmental use, and rights asserted under such Acts are provided for in the Court of Claims Acts, so that moneyed interests have not had any occasion to stand on the constitutional provision.

The Lee and the Gt. Falls Mfg. Co. cases were accidents. In the Lee case the government stood upon a tax deed, and in the Gt. Falls case there was a dispute as to the taking.

Furthermore, no question such as is presented here could possibly come up for necessary determination in any suit in the Court of Claims. Being a court of special and limited jurisdiction, the only jurisdictional question which can be decided by that Court is whether a given suit is within the provisions of the Court of Claims Acts. If it is, the court has jurisdiction, as Congress has given that Court the right to entertain such suits. If it is not,

then the Court has no jurisdiction, even though the claimant might have the right to maintain the action in the District Court sitting as a court of general jurisdiction.

The cases which were not brought in the Court of Claims were brought under Congressional Acts in which Congress had not given the claimant the right to sue, thus coming under the first class of cases heretofore alluded to, i. e., those arising under claims finding root in a statute which has not provided for the determination of disputes by the courts, but has provided an administrative "mock" court.

The case of

Silberschein vs. U. S.
266 U. S. 221,

was based solely upon the World War Veterans Act. No question of the right of the disabled soldier under the Fifth Amendment was suggested or discussed.

No case has yet been cited by Respondent, and we have found none, purporting to hold a principle contrary to that argued in this subdivision of our brief, or conflicting in any way with the case of

U. S. vs. Lee,
16 Otto 196

It is true that in many decisions this Court has made the broad statement that "the United States cannot be sued without its consent," but those statements, when

properly analyzed, do not militate against the position of Petitioner.

First, the statement must be deemed to have reference only to matters involved in the case in which such language is used. The Court is not presumed to be deciding any question not before it and requiring decision.

Second, the Lee case and the Great Falls Mfg. Co. case necessarily hold that consent to be sued is implied from the last proviso of the Fifth Amendment.

Furthermore, if the Court has inadvertently made statements broader than required in the case before it, and which might be construed as deciding an academic question, such statements are *obiter dicta*, and are binding on no one.

Any other interpretation would make any pronouncement of this Court an *edict*, rather than a judgment.

This Court has repeatedly declared the non-binding effect of *dicta*.

> "This suggestion (of dicta uttered in previous decisions) is inconsistent with the settled rule that general expressions in an opinion *which are not essential to dispose of a case*, are not permitted to control the judgment in subsequent suits." (Italics and parenthetical statement ours).
>
> Harriman vs. Northern Sec. Co.
> 197 U. S. 244 at p. 291

> "Observations in the opinion of a court as to rights on which no claim was based in that case, the decision rendered being affirmed on other

grounds, *are neither authoritative nor persuasive.*" (Italics ours).

McLaren vs. Fleischer
256 U. S. 477

"Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, *are not to be considered as having been so decided as to constitute precedents.*" (Italics ours).

Webster vs. Fall,
266 U. S. 507

These decisions dispose of all cases which have been cited by respondent, purporting to hold a doctrine contrary to that established by the Lee case and the Gt. Falls Mfg. Co. case.

The District Court and counsel for Respondent have taken the position that we are attacking the Selective Service Acts. We have examined the record carefully and find nothing in our pleadings or in our briefs to warrant such assumption.

Assuming that this error is made in good faith, however, we will set that matter at rest by the following statement:

We not only admit the power, but we insist that it is the *duty*, of Congress to conscript for war service; *but we insist that the power to confiscate the bodily integrity and earning power of our war disabled for a public use carries with it the obligation to compensate*, as in any other exercise of the power of eminent domain.

IN GENERAL

The question of the legal obligation of this country to its war disabled has never been discussed in any decision of this Court, so far as we have been able to find, or has been disclosed in any brief of Respondent.

The comments of this Court on "pensions" are simply confirmatory of Webster's definition, that pension is a "gratuity", "something not earned", "*not required by justice*',—in short, *charity;* and established no new law.

> Walton vs. Cotton,
> 19 Howard 355,
> 15 L. ed. 658

is probably the earliest case dealing with pensions. No previous decisions are cited in the opinion. There we find the statement

> "The pension is undoubtedly a bounty of the government."

Similar dogmatic statements have been repeated from time to time to this date. Nowhere do we find any discussion of the question whether this country owes an obligation under the constitution to compensate the youth whose bodily integrity and earning power has been consumed in the defense of this country, *while the obligation to pay the profiteer cost or value and billions of dollars of profit for insensate material for the same purpose has been taken as a matter of course.*

No reason has been developed in any of these decisions:

Why all citizens whose property is taken "to raise and support armies" for war do not stand on the same footing;

Why we are legally obligated to compensate the owner of a B-29 which was damaged while being flown over Tokio, *but owe no such obligation to the pilot or gunner whose body was riddled with machine gun bullets and flak while flying the B-29;*

Why if payment to the pilot or gunner is "gratuity", *we don't class the payment to the owner of the B-29 as "gratuity", and pay him such amount as we may see fit, or withhold payment altogether;*

Why the owner of the B-*29* is accorded admission to this Court in establishing his claims, *but the pilot and the gunner are barred from every court;*

Why Yamashita, the Tiger of Malaya, finds ready access to this Court, but the soldier who was disabled while chasing the Tiger to his lair is cast into outer darkness;

Why, if we say that the political courts of the Veterans Administration provide due process, do we maintain an expensive federal court system for the influential, instead of having "justice" dispensed as a clerical routine by the political employee of the bureaus.

All these questions can be condensed into one short one:

Are we a democracy, or are we simply a political oligarchy, another name for a totalitarian state?

In our democracy the well-being of the individual citizen is paramount. All questions arising under the Constitution must be resolved in favor of the rights of the individual citizen.

The constitution is not a fetish, to which human rights must bow. It is an instrument designed solely to conserve human rights; and if so construed it is an extremely beneficent document; otherwise it may become an instrument of oppression.

The selfish interests of majorities, no matter how large, must yield to the rights of a minority, even a minority of one. The sole purpose of the Bill of Rights is to protect minorities, as, in a political government, the majority is able to take care of itself.

Property, as such, has no standing under the Constitution, but is of importance only in its relation to the life and material welfare of human beings.

A man born with a sound body, without other material heritage, starts life with no property but his body and his constructive and acquisitive ability—earning power.

With this primary property he acquires material property with which to enjoy a comfortable livelihood.

When we consume this property, his earning power, we have taken his "property" under the Fifth Amendment as certainly as though we had taken only insensate property.

The men who are suffering from this autocratic system are the men of the rank and file; men from the mine, from the farm, from the factory, and from the other humble walks of life; men without economic or political prestige,—*men whose only property, which stood between them and mendicancy, was their bodily integrity and earning power, without which they are at the mercy of society.*

These were the men who made up the large majority of those who fought in the foxholes, in the air, upon and under the sea, and upon whom the heel of the dictator grinds the most harshly.

They fought to protect us from dictators, and by that very service they found themselves precipitated into the abyss from which they saved us at the expense of their own democratic rights and their economic independence.

We have tried, thus far without success, to induce someone to give sound reasons why the disabled war veteran is the only person in this country who is denied

any rights under the Constitution when his right to a decent livelihood, in which his whole life is centered, is at stake.

We have also tried in vain to find out why a totally disabled veteran is expected to live decently and raise a family not grossly underprivileged on $138.00 per month; or, if the political "courts" of the Veterans Administration rate him only 10% disabled, while actually 100%, how can he do this on $13.80 per month; or if he is denied anything, although 100% disabled, how he is to subsist at all.

The average payments per month to the World War II disabled during the year ending June 30, 1945, was $38.07 per month.

Veterans Administrator's Report 1945
Page 11.

During the year ending June 30, 1946, the amount per month was reduced to $35.01.

V. A. Report for 1946, Page 14 ll. 25-29

Is the short answer to this whole proposition: That the war is over; that we don't want to pay; that we invent fictions with which to justify our denial of any obligation to these wrecks of the war, and salve our conscience by placing our disabled veterans on our charity list, boast of our philanthropy when we throw them a little largess, but keep ourselves in a position to cut them off the list

when we want to use the money for something else, instead of practicing economy by cutting off contract or other obligations, the repudiation of which does not cause daily human suffering?

We submit that the affirmative propositions set out in our petition and in the beginning of this brief are the law, and that the decision of the Circuit Court of Appeals should be reversed with appropriate instructions.

Respectfully submitted,

JOHN W. MAHAN,
C. E. PEW,
Attorneys for Petitioner

INDEX

CITATIONS

738106—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1103

EDWARD C. COMMERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the District Court of the United States for the District of Montana (R. 18–34) is reported at 66 F. Supp. 943. The Circuit Court of Appeals for the Ninth Circuit affirmed from the bench without opinion (R. 47–48).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 16, 1947 (R. 48). The petition for a writ of certiorari was filed March 7, 1947. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the

Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a person, who is drafted into the armed forces of the United States and is injured while serving therein, may sue and recover from the United States damages for loss of "bodily integrity" and earning power, on the theory that there has been a taking of his body for public use without the payment of just compensation therefor.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment is as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

Petitioner, Edward C. Commers, was inducted into the military service on October 19, 1942,

pursuant to the provisions of the Selective Training and Service Act of 1940, c. 720, 54 Stat. 885 (50 U. S. C. App. 301 *et seq.*) (R. 4). Prior to that time he was earning, as a manual laborer, at least $200 per month (R. 8). After receiving his basic training he was assigned to the 6th Infantry Division of the United States Army and served with that Division in various campaigns in New Guinea and the Philippine Islands (R. 4–6). In these campaigns he received severe injuries and was afflicted with malaria and other diseases and tropical maladies (R. 5–7). During his service in the Army, from which he was discharged on August 6, 1945, he was awarded two Silver Stars,[1] one Bronze Star Medal,[2] three Purple Hearts,[3] and a Good Conduct Medal[4] (R. 4, 6, 16).

On March 26, 1946, petitioner filed an amended complaint in the District Court of the United States for the District of Montana alleging that because of the injuries and sicknesses which he had suffered during his Army service he is unable to follow any substantial gainful occupation as a

[1] Awarded for gallantry in action. See Army Regulations 600–45, 22 September 1943, par. 13.

[2] Awarded for gallantry in action, to recognize minor acts of heroism in actual combat. Army Regulations 600–45, 22 September 1943, as changed by Changes No. 3, 25 April 1944, par. 15½.

[3] Awarded for wounds received in action. Army Regulations 600–45, 22 September 1943, as changed by Changes No. 7, 14 July 1945, par. 16.

[4] Awarded for exemplary behavior, efficiency, and fidelity. Army Regulations 600–68, May 4, 1943.

manual laborer, and that it is reasonably certain that his disabilities will continue in a totally disabling degree throughout his life (R. 7). He is now receiving from the Veterans' Administration of the United States for his disabilities the sum of $34.50 a month when he is not hospitalized and $20 a month when he is in a hospital (R. 8).

The petitioner prayed for a declaratory judgment holding in substance, (1) that the taking of his body and earning power for use in the military forces of the United States was a taking of private property for a public use; (2) that the United States is obligated not only under the Fifth Amendment, but as a matter of natural right, to make just compensation to petitioner and all other veterans disabled in World War II; (3) that petitioner and all other disabled war veterans are constitutionally entitled to try their claims for bodily impairment in the district courts of the United States and to have the jury trial guaranteed by the Seventh Amendment; (4) that the consent of the United States to be sued upon the claims of its war disabled is implied from the Fifth Amendment (R. 15–16).

The United States filed a motion to dismiss the complaint on the grounds that it did not state a claim upon which relief could be granted and that the court was without jurisdiction as the United States had not consented to be sued in this manner (R. 17). The judgment of the District Court

(R. 35) granting the motion to dismiss was affirmed by the court below without opinion (R. 48).

ARGUMENT

Petitioner contends that the admitted power of the United States to raise armies by conscription (Pet. 21) is subject to the provision of the Fifth Amendment that "private property" shall not be taken for public use without just compensation, that any soldier whose "bodily integrity and earning power have been consumed in the common defense" is entitled to compensation therefor, and that such soldier may have the existence and extent of his disabilities determined in the courts of the United States and be "justly compensated therefor as a matter of constitutional right" (Pet. 7, 8).

Petitioner's contentions have a certain philosophical appeal, but that is their only merit. Whatever may be the scope of the Fifth Amendment with respect to property destroyed in the course of actual military operations (*United States* v. *Pacific Railroad,* 120 U. S. 227), the short and conclusive answer to petitioner's argument is that, since the ratification of the Thirteenth Amendment, there has been no property right in a living human body. And, while that Amendment ended slavery and all other forms of involuntary servitude (*Clyatt* v. *United States,* 197 U. S. 207; *Bailey* v. *Alabama,* 219 U. S. 219; *United States* v. *Reynolds,* 235 U. S. 133), it did

not terminate the numerous civic duties which require the citizen to devote his labor and if need be, his life, to the service of the community. In those categories are included the duty to render military service (*Selective Draft Law Cases,* 245 U. S. 366), the duty to labor for a reasonable time on public roads near his residence without direct compensation (*Butler* v. *Perry,* 240 U. S. 328), and the duty to assist the police to enforce the justice of the state (*Matter of Babington* v. *Yellow Taxi Corp.,* 250 N. Y. 14, *per* Cardozo, Ch. J.)

This Court has several times pointed out the nature of the obligation of military service. *Jacobson* v. *Massachusetts,* 197 U. S. 11, 29; *Selective Draft Law Cases,* 245 U. S. 366, 378. In the latter case, Chief Justice White said, in words which have frequently been quoted:

> It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it.

The same thought is expressed in the Congressional declaration contained in Section 1 (b) of the Selective Training and Service Act of 1940, 54 Stat. 885, 50 U. S. C. App. 301 (b):

> that in a free society the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of selective compulsory military training and service.

The basic fallacy of petitioner's view is that he confounds the nation's right to compel the citizen's obligation to render military service with a taking of property. Once that distinction is recognized, his entire case falls. It may be a distinction which is historical rather than logical, but it is well settled; and, here also, "Upon this point a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349. Consequently we do not deem it necessary to discuss the technical jurisdictional infirmities of the present complaint, which are adequately disposed of in the opinion of the District Court (R. 30–39).

CONCLUSION

Petitioner's case is quite without merit, and the court below properly affirmed, from the bench, the dismissal of the complaint. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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